FISCHER IMAGING CORPORATION

CONTRACT NO. V797P-6712A **VABCA-6343, 6344**
DELIVERY ORDER 797160814 **6446, 6460**

VA MEDICAL CENTER
LOS ANGELES CALIFORNIA

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OPINION BY ADMINISTRATIVE JUDGE KREMPASKY

These timely appeals of Appellant, Fischer Imaging Corporation (FIC), result from the Respondent's, Department of Veterans Affairs (VA or Government) termination for cause of Delivery Order (DO) No. 797160814 under Contract No. V797P-6712A (Contract), the VA's claim for repayment of the amounts it paid FIC for a radiographic electrophysiology system delivered to the VA Medical Center at Los Angeles, California (VAMC LA) and the VA's claim for the additional costs of acquiring a replacement electrophysiology system

from another vendor. The appeal in VABCA-6343 is from the Contracting Officer's (CO) final decision terminating the DO for cause. The appeal in VABCA-6344 involves the VA's demand that FIC repay the $324,174 the VA paid for the electrophysiology system. The Board docketed both of these appeals on June 19, 2000. The VA assessed FIC $17,221 by CO final decision for excess costs it incurred in acquiring a replacement electrophysiology system; FIC's appeal from this decision was docketed on September 22, 2000 as VABCA-6446. Finally, the appeal in VABCA-6460 is from the CO's final decision denying FIC's September 6, 2000 claim of $9,600, which represents costs FIC alleges it incurred to remove its electrophysiology system from VAMC LA after the termination of the DO for cause. This appeal was docketed September 22, 2000. The Board consolidated all these appeals for further proceedings by its ORDER of September 26, 2000.

The parties have elected to submit these appeals for decision on the Record pursuant to Rule 11. The Record before the Board consists of: the Pleadings, the consolidated Appeal File (cited as "R4, tab __") consisting of 44 exhibits and the parties' simultaneous MAIN and REPLY BRIEFS (cited as (FIC or VA) MAIN, or (FIC or VA) RPLY at ___). Both entitlement and quantum are before the Board.

FINDINGS OF FACT

The VA National Acquisition Center in Hines, Illinois (VANAC) issued Solicitation No. M6-Q8-96 (Solicitation) on January 31, 1996 for diagnostic X-Ray systems and related equipment. The Solicitation contemplated a multiple-award, indefinite-delivery/indefinite-quantity (ID/IQ) commercial items contract.

VANAC awarded FIC, as one of several vendor awardees, the Contract for X-Ray systems on September 19, 1996. (R4, tabs 1, 33)

The Contract includes the standard Federal Acquisition Regulation ("FAR"), 48 C.F.R. Chapter 1, prescribed for ID/IQ contracts for commercial items, including the following clauses relevant to these appeals:

> CONTRACT TERMS AND CONDITIONS-COMMERCIAL ITEMS, FAR 52.212-4 (OCT 1995)
> ORDERING, FAR 52.216-18 (OCT 1995)
> ORDER LIMITATIONS, FAR 52.216-19(OCT 1995)
> INDEFINITE QUANTITY ($100 GUARANTEED MINIMUM), FAR 52.216-22 (OCT 1995)

The relevant part of FAR 52.212-4 is subsection (a) INSPECTION/ACCEPTANCE which states:

> The contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. The Government must exercise its postacceptance rights (1) within a reasonable time after the defect was discovered or should have been discovered; and (2) before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

(R4, tab 38)

In addition to prescribed FAR clauses for commercial item supply contracts, the Contract contains the following relevant terms and conditions:

> COMMERCIAL INTERIM PAYMENT (PART I-CONTINUATION OF SF 1449)
>
> (a) Definition: A commercial interim payment is a payment given the contractor after some work has been done (FAR 32.202-2). For the purposes of this contract, delivery of the equipment shall constitute "some work done."
>
> (b) Upon delivery of the equipment, the contractor is entitled to a single interim payment consisting of 80 percent of the purchase price. To receive the interim payment, the contractor shall submit an invoice in the amount of the equipment purchase price. The invoice shall be submitted in accordance with 52.212-4, Contract Terms and Conditions-Commercial Items, paragraph (g) and the "Remittance Address" instructions provided above.
>
> (c) Verification of the contractor's entitlement to the interim payment shall be accomplished by the medical center providing to the contracting officer a receiving report confirming receipt of the equipment. Upon receipt of the receiving report and the contractor's properly submitted invoice, the contracting officer shall authorize and process the 80 percent interim payment.
>
> (d) The Government shall retain the remaining 20 percent of the purchase price until such time as the installation has been completed and Government has inspected and accepted the installed equipment.
>
> (e) Commercial interim payments are contract financing payments for prompt payment purposes and therefore are not subject to the interest penalty provisions of the Prompt Payment Act (FAR 32.202)

TECHNICAL ACCEPTANCE (PART I-CONTINUATION OF SF 1449)

Prior to acceptance of the goods or services provided under this contract, inspection and testing will be performed by the Government in accordance with II-3, Acceptance Procedures, located in Part II, Contract Terms and Conditions. This inspection will be completed and results furnished within 45 calendar days after receipt of request for inspection as provided under this contract. For purposes of determining the payment due date under this contract, and for no other purpose, the date of acceptance of the goods and services provided under this contract shall be the actual date of acceptance by the Government or the number of days after request for inspection indicated herein, whichever is earlier, provided delay in acceptance is not the fault of the contractor.

DESCRIPTION/SPECIFICATIONS/SCOPE OF WORK (PART I-CONTINUATION OF SF 1449, SOLICITATION/CONTRACT/ORDER FOR COMMERCIAL ITEMS)

I-1 SCOPE

This solicitation provides for the normal supply requirements of the Department of Veterans Affairs and other Federal Agencies upon their request for delivery within the 50 states, Washington, D.C., and Puerto Rico. The resultant contracts will be used as mandatory sources for the articles or services listed herein. Articles or services will be ordered from time to time in such quantities as may be needed to fill any requirement determined in accordance with currently applicable procurement and supply procedures. It is anticipated the Other Government Agencies (OGA's) will participate in resultant contracts.

I-2 ITEMS OFFERED

Items offered are to be contractor's standard commercial product line, and as such, MUST conform to specifications defined in the contractor's product and technical data. Also items offered must comply with the acceptance inspections as found in QUALITY ASSURANCE MANUAL FOR RADIOLOGY Attachment 1. *(Emphasis in original.)*

I-13 OPERATIONAL UPTIME

(a) Unit must be operable and available for use 95% of the normal operational time. Operational time is considered 7:00 am-10:00 p.m. Repairs are to be made during normal work hours. Downtime will be computed from notification during normal work hours. Scheduled maintenance will be excluded from downtime. (Normal work hours are 8:00 am-5:00 p.m., Monday through Friday, excluding national holidays.) Failure to meet this requirement for three consecutive months will be grounds for termination for cause under paragraph (m) of clause 52.212-4, "Contract Terms and Conditions – Commercial Items."

(b) Refusal of access to the equipment indicates the unit is up and running and time will not be considered when determining downtime. Refusal of access to the equipment voids the service request.

PART II-CONTRACT TERMS AND CONDITIONS, ADDENDA TO 52.214-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS

II-3 ACCEPTANCE PROCEDURES

(a) Upon completion of installation the equipment will be turned over to the hospital for use. . . . Final acceptance of the equipment and installation will be based upon an inspection and test . . . within thirty (30) calendar days from date of

receipt of request for inspection. If equipment passes inspection or if acceptance inspection is not conducted within thirty (30) calendar days from date of receipt of request for inspection, the Government shall accept installation with guarantee date commencing with date of receipt of notification for inspection. Use of the equipment during the period between completion of installation and inspection and/or inspection and reinspection shall not negate the right on the part of the Government to reject the equipment, should it fail, nor to preclude default action against the contractor in the event of failure to correct deficiencies.

(b) In the event the equipment is rejected, contractor will be advised as to deficiencies which were the cause for rejection. It shall be contractor's responsibility to correct reported deficiencies and to advise the Contracting Officer when all corrections have been made and equipment is ready for reinspection. Reinspections will be performed by the Government with all cost incurred chargeable to the contractor's account.

* * * * * *

(d) If acceptance has been made and guarantee period established due to the failure of the Government to perform the inspection within the specified time, this does not waive the rights of the Government to perform an inspection (at the Government's expense) nor does it waive the right of the Government to perform reinspections, if deficiencies are noted, with costs incurred chargeable to the contractor's account. Acceptance of the equipment due to the failure of the Government to perform the inspection within the specified time shall not negate the right on the part of the Government to exercise its rights under the Termination for Cause provisions of the contract in the event the contractor fails to correct the reported deficiencies.

(R4, tabs 2, 38)

On September 20, 1996, VANAC awarded Delivery Order (DO) 797160814 to FIC for the "Epic 32 Single Plane Electrophysiology System and associated peripheral equipment (EP32) for delivery to VAMC LA for a price of $405,218. Although the DO specified a delivery date of January 23, 1997, delivery was delayed at the request of VAMC LA. (R4, tabs 3, 4, 14, 37, 38, 39)

The EP32 was installed in June and July 1998. FIC requested the VA's inspection of the EP32 by a July 22, 1998 letter to the CO, Mr. Bense. The record is not clear when the CO received FIC's request for inspection; but, by a July 28, 1998 memorandum, Mr. Bense asked the VA Asset Management Service (SAMS) to conduct the inspection by August 26, 1998, thirty days from July 27, 1998. SAMS is the proponent of the VA's QUALITY ASSURANCE MANUAL FOR RADIOLOGY, Revision #8 May 1993, (Manual) and was the VA organization charged with general oversight, including acceptance testing, of radiological equipment. (R4, tabs 3, 35)

Mr. Kris Kirwan, a SAMS inspector, inspected the EP32 on September 14-18, 1998. By memorandum of September 22, 1998 to the CO, Mr. Kirwan recommended rejection of the EP32. This recommendation was based on 14 deficiencies identified by Mr. Kirwan as a result of his inspection. Seven of the 14 deficiencies stemmed from missing manuals for various components of the EP32, three of the deficiencies related to the failure of the EP32 to meet performance standards listed in the Manual and two of the deficiencies involved equipment listed on the DO that was missing. (R4, tabs 4, 32, 39)

The CO informed FIC of the discrepancies found in the inspection in an October 6, 1998 letter and requested that FIC either inform him of the correction of the deficiencies by October 20, 1998 or, if a discrepancy could not be corrected by October 20, FIC's estimate of the date by which the discrepancy would be rectified and when the EP32 would be ready for a reinspection. (R4, tab 4)

FIC responded by letter of October 25, 1998 from Mr. DeCarolis, FIC's Vice President Sales/Marketing and Service, representing that all but one discrepancy had been corrected and that the EP32 was contract compliant. Mr. DeCarolis requested the VA's acceptance of the system. FIC did not address one of the performance discrepancies listed by the VA, kvp fluoroscopic response time, in its October 25 letter. In a November 14, 1998 internal assessment, FIC acknowledged that the kvp response time problem could not be addressed with field forces. (R4, tabs 5, 27)

Mr. Bense requested that VAMC LA reinspect the EP 32 by "local verification" in a November 18, 1998 memorandum. The inspection/local verification was performed by VAMC LA and signed by Dr. Phillip Sager, Staff Physician in the VAMC LA Electrophysiology Lab on December 23, 1998. Dr. Sager did not personally verify any of the representations in FIC's October 25, 1998 letter or the correction of any of the discrepancies listed in the SAMS September 1998 inspection report. Neither he, nor the VAMC LA had any capability to perform any technical inspections on the fluoroscopic, electrical or mechanical performance of the EP32. Nevertheless, Dr. Sager's report to the CO represented that most of the SAMS identified discrepancies had not been corrected. In addition, Dr. Sager complained that the EP32 fluoroscopic image was poor and that the "table [EP32] frequently breaks." Dr. Sager's response to the CO ended with the following statement:

> My staff and myself have spent many hours with Fischer trying to get the system's deficiencies fixed to no avail. The response has been terrible and if was possible to have the system removed and replaced by one from another vendor, that would be my choice. The vendor should definitely not be paid.

The Chief of VAMC LA's Biomedical Engineering Department, Mr. Clement, did not consider Dr. Sager's "local verification" to be an inspection as that term was used within the context of the Contract. (R4 tabs 6, 37, 38)

The CO informed FIC on December 29, 1998 of the results of VAMC LA's "local verification" by relating the 13 deficiencies found still outstanding. Three of the deficiencies noted in the September 1998 SAMS inspection were not included on this list; eleven of the deficiencies from the SAMS inspection were repeated in the December 29 letter. Two additional deficiencies, poor fluoro image and the frequency of the EP32 malfunctions were also noted. The CO requested that FIC notify him by January 15, 1999 of the correction of the deficiencies or the dates by which the deficiencies would be corrected and when re-inspection of the EP32 could be anticipated. (R4, tab 6)

FIC did not respond to the December 29, 1998 letter reporting the results of "local verification." On January 21, November 3 and December 3, 1999, the CO requested FIC to review the DO and "provide the current status" stating, in each instance, "Information is necessary to expedite administrative procedures." There is nothing in the record indicating that FIC formally responded to these requests. (R4, tab 7)

Mr. Bense, by memorandum to Mr. Bruce Johnson, a Biomedical Technician at VAMC LA, on December 13, 1999, referencing a previous phone conversation, forwarded the documentation pertaining to the SAMS inspection and local verification of the EP32 and stated the following:

> This system clearly has problems. Here's what I need to help you more. I need a statement from your station, documenting the problem or problems that have been recurring. For example, have you had any instances of failure on Fischer's part to perform maintenance? Have you had any breakdowns of the system? Any non-repaired intermittent problems?

> Copies of service call records, Bio logs, exc. [sic], can be very helpful. Also, if you want to initiate a complaint letter regarding this order, the letter would be helpful.
>
> Nobody said this would be easy … but we can get there from here. Oh by the way, PLEASE don't forget to include your contracting people (Gail Prude, etc.) in everything we're doing as regards this order. Thanks.

Responding to Mr. Bense's request, in two memoranda, both dated January 26, 2000, VAMC LA Electrophysiology Lab medical personnel listed thirteen service calls on the EP32 between October 1998 and December 1999, some of which involved the EP Lab being unavailable for several days before repairs were effected. The memoranda also listed 12 complaints about the EP32 performance and contained the following statements:

> In summary, the fluoroscopy system continues to function erratically and inadequately, with consequent inconvenience for VA personnel and patients and potential serious hazards for patients.
>
> After 17 months of continual breakdowns and inadequate performance of both the fluoroscopy unit and the table, the Fischer Imaging System is clearly a failure. The best solution to ensure safe and efficient patient care in the Eltrophysiology Laboratory is to remove the Fischer Imaging System and replace it with a better system from another vendor.

(R4, tabs 12, 22)

> FIC wrote to Mr. Bense on December 16, 1999 stating:
>
> The order #797160814 was installed and inspection requested by Phil Spencer, our Western Region Service Manager on July 22, 1998.

> Fischer Imaging has worked with Dr. P. Sager to resolve initial installation requests for service issues as outlined in my letter to you dated October 28, 1998.
>
> The lab is operational and doing clinical cases.

(R4, tab 8)

Mr. Bense replied to this letter on December 17, 1999, referring to the EP32's two failed inspections (one of which was the December 1998 "local verification"), stating that the EP32 had not been accepted. Mr. Bense continued:

> The statement in your letter that "(t)he lab is operational and doing clinical cases…" is not germane to this issue. No response from Fischer Imaging has been received to my December 29, 1998, letter identifying the discrepancies from the most recent reinspection. My January 21, 1999, and November 3, 1999, letter requesting a status update was not responded to by Fischer, either.
> What does Fischer Imaging intend to do regarding this system? Are you intending to continue providing service on this system at no cost? Do you intend to request a reinspection?
>
> I must caution you that this issue cannot continue unresolved. I do not believe that you want this, either. Therefore, I expect to receive your answers to these questions before December 30, 1999. I cannot, and will not let this issue rest, and will use all resources available to me to reach a resolve [sic].

(R4, tab 8)

Mr. DeCarolis of FIC again wrote Mr. Bense on December 17, 1999 stating:

> Attached is the correspondence involving Order #797106814. I have responded to your memos and requested reinspection. The reinspection has not been issued to date, per Phil Spencer, our Western Region Service Manager.
>
> Since the inspection was not done and Dr. Sager is pleased with the lab, Fischer assumed acceptance and payment.

Attached to the letter were copies of two FIC internal memoranda from Mr. Spencer to Mr. DeCarolis. The first, dated December 15, 1999, represented that all the discrepancies had been rectified save two, the kvp response time and the isocentering mechanism of the EP32 C-Arm noting that the EP32 was installed and the VA initiated procedures using it in August 1998. The second memorandum is dated December 16, 1999 and relays the chronology relating to the SAMS inspections and relates the following:

> The room has been used continuously since turnover. We have serviced the lab under warranty since it was installed (18 months to date).
>
> This has been a high maintenance account, particularly immediately after turnover. Dr Sager believed he had purchased a 1000 line TV chain and was unhappy to discover his error and subsequent image quality. There was also a dispute between Dr. Sager and Fischer Imaging Sales regarding some research money. I do not know the story surrounding this issue.

(R4, tab 9)

Mr. Bense requested that SAMS re-inspect the EP32 on December 28, 1999. Mr. Kirwan of SAMS performed the re-inspection on February 7, 2000. Based on his identification of 13 specific deficiencies, Mr. Kirwan, by memorandum of February 10, 2000 to Mr. Bense, stated that he had inspected the system between February 7 and 9, 2000 and recommended rejection of the EP32. In addition, Mr. Kirwan noted the poor image complaints of VAMC LA personnel and the complaints that the "table does not work properly." With regard to the latter, Mr. Kirwan represented that FIC was rewriting software and installing firmware

to enable proper table operation. Mr. Kirwan's inspection report concluded with the following:

> I spoke with Malcolm Bersohn, MD., Ph.D., Chris Crofton, MMT, and Mervin Clement, Chief Biomedical Engineering that the Fischer Lab is very unsafe and that they are to make the decision to use the room.
>
> I recommend a complete re-inspection on the Fischer EP lab by a Quality Assurance Specialist.

Two service representatives from Fischer were present at the inspection and both represented that the inspection lasted for approximately one-half day on February 7, 2000. (R4 tabs 10, 39, 40, 41)

The CO, in a February 16, 2000 letter citing the 13 discrepancies from Mr. Kirwan's inspection report, requested FIC to inform him either of the correction of the discrepancies by March 1, 2000 or to state why correction could not be made. Mr. Bense also instructed FIC to give him the date on which FIC would have the EP32 ready for re-inspection. (R4, tab 11)

On February 17, 2000, Mr. Bense issued a CURE NOTICE to FIC citing that the EP32 did not function fully as ordered and that FIC had not ensured the proper functioning of the EP32. Mr. Bense gave FIC until March 1, 2000 to correct the EP32 "failures", including those noted in the February 16, 2000 inspection report, and to insure the compliance of the system with the OPERATIONAL UPTIME Contract clause. The CURE NOTICE documented the failures of the EP32 as follows:

> a) The installed system has failed three (3) formal acceptance inspections, the latest conducted on February 9, 2000. The results of each inspection were documented and forwarded to you.

b) You have failed to deliver all items required by the delivery order.

In addition to the above discrepancies, the following information has been documented to us, and is presented to you, to further substantiate this cure notice.

1. Excess time to repair outages. One particular example cites a temporary repair being in place 47 days, at the time of the latest inspection, even though Fischer Imaging service field engineer had repair part with him.
2. Non-acceptable images, with noise on the overlays.
3. Continued inability to correct table problems.

(R4, tab 13)

FIC responded to Mr. Bense's CO's February 16, 2000 inspection letter by a letter of March 3, 2000 wherein it represented that 12 of the 13 discrepancies listed in the VA's February 16 letter had been satisfactorily resolved and that FIC was taking steps to resolve the 13th listed discrepancy, kvp response time, with a "software/firmware" fix. Based on its assessment of the status of deficiencies, FIC requested a re-inspection. The CO did not respond to this letter and by a Memorandum for Record dated March 8, 2000 characterized FIC's March 3 response thusly:

> Received written response, from Anthony DeCarolis @ Fischer Imaging, to my cure notice. This response was dated 3/3/00, and the "cure " date was set a 3/1/00. In the response, Fischer was attempting to "broker a deal" and keep the order alive. I contacted Danny Ray on 3/7/00 at the VAMC, and asked him to verify if Fischer had been at their site performing any work on the system. Danny called me back on 3/8/00 and advised that Fischer had been present for 2 days moving some cables around. No other work had been performed.

There is no evidence in the record that Mr. Ray had any first-hand knowledge of the EP32, whether he performed an inspection of the EP 32, or of the basis for the telephonic representations related by Mr. Bense. (R4, tab 14)

The CO, by letter of March 15, 2000, terminated the DO for cause stating, in pertinent part:

> The act(s) or omission(s) constituting the default: a failure to provide an ordered system meeting the terms and conditions of the contract. The contractor, Fischer Imaging Corporation, failed to deliver a fully functional system to VAMC Los Angeles, CA. Clause 1-2, ITEMS OFFERED, directs that "…items offered must comply with the acceptance inspection…" The delivered system failed three consecutive acceptance inspections, performed using the Quality Assurance Test Procedures stated in the contract, and Fischer Imaging was notified each time of the list of discrepancies. (See letters, dated October 6, 1998, December 29, 1998, and February 16, 2000) The failure causes for each inspection were nearly identical. This indicates that little or no correction was performed prior to re-inspection. In addition, Fischer Imaging demonstrated a lack of cooperation in correcting performance deficiencies. For example, Fischer Imaging unilaterally selected what would be delivered, and exchanged ordered components, without the benefit of a modification to the delivery order.

In the Termination for Cause, Mr. Bense also directed FIC to remove the EP32 from VAMC LA and informed FIC that the VA would be procuring replacement equipment and that FIC would be liable for any costs of the replacement equipment over the DO price. The Termination for Cause was accompanied by a unilateral modification terminating the DO for cause and reducing the DO to $0 and a Collection Voucher demanding FIC's immediate re-payment of the 80% of

the DO price ($324,174) previously paid by the VA. Mr. Bense, on March 15, 2000, also sent a memorandum to VAMC LA directing it to cease using the EP32 and providing instructions concerning FIC's forthcoming removal of the system. FIC removed the EP32 from VAMC LA on May 18, 2000. (R4, tabs 16, 17, 29)

In an undated FINDINGS AND DETERMINATIONS justifying the termination of the DO for cause, the CO found, in pertinent part:

> (2) The Contractor, Fischer Imaging Corporation, failed to deliver a fully functional system to VAMC Los Angeles….The failure causes for each inspection (e.g. problems with fluoro KVP response timing, problems related to ISO center, and loose cable tripping hazards) were nearly identical, and were fully documented both in the file and to Fischer. This indicates that little or no correction was performed prior to a re-inspection. Fischer did submit documents to argue their point, all after the suspense date originally provided by the Government for their response, when discrepancies were identified. Although reviewed by technical people, and by the customer, none of the documents were formally accepted by the Government and modified into the order. In addition, Fischer Imaging took it upon themselves to select what would be delivered, and to exchange ordered components, without the benefit of a modification to the delivery order. Only one exchange of ordered components was ratified by a modification to the order.
>
> (7) Fischer Imaging's methods, as they relate to Government contracting, run contrary to that which is normally encountered from a Government contractor. For example, Fischer was aware that they needed to pass an acceptance inspection, and had been issued a Cure Notice to that effect. This Cure Notice action was only taken after 3 prior attempts at acceptance inspections, Fischer failed to demonstrate an assurance that deficiencies would be corrected. Instead of curing the system at VAMC Los Angeles, Fischer contacted the Government for another

> inspection after the cure date had lapsed. A check with the principles [sic] at the hospital revealed that Fischer had done nothing constructive (a Fischer technician had been working on the cables identified as tripping hazards) toward curing the major system problems during the interim period.

(R4, tab 15)

The VA purchased a replacement electrophysiology system from Trex Medical Corporation on September 19, 2000 for a price of $422,439 after soliciting offers from eight other Contract holders for systems similar to the EP32. Because of ongoing construction at VAMC LA, delivery of the Trex system was set for October 1, 2001. (R4, tabs 18, 19, 44)

On June 20, 2000, the VA, by final decision, assessed FIC $17,221, the difference between the price of the EP32 and the Trex Electrophysiology system and demanded FIC's payment of that amount. (R4, tab 21)

The February 2000 inspection letter, on which the termination for cause was based, listed 13 discrepancies supporting rejection of the EP32. The first of these was the missing Polaroid Freeze Frame Imager. The Polaroid Unit, DO Item #5, was discontinued by Polaroid subsequent to FIC's submission of its quote. FIC replaced the Polaroid unit with an equivalent Sony unit; however, the parties never modified the DO to reflect that fact. There is no evidence that the VA objected to the Sony unit provided other than that the DO had not been modified to reflect that a Sony, not a Polaroid unit was to be provided. (R4, tabs 2, 13, 26, 40, 43)

Discrepancies 2 and 4 listed in the February 16 Inspection letter relate to the way cables servicing the system were installed. Discrepancy 2 involved cables for the table controls, which were cited as safety hazard because the cables were lying on the floor. FIC asserts that the installation of the table control cables was its standard installation but that its personnel had installed a new box on the

floor in which the cables were "landed" at the request of VAMC LA medical personnel and draped the cables to alleviate any potential tripping hazard. The EP32 users at VAMC LA perceived that the issue had been resolved and did not identify cables lying on the floor as a particular problem. The video cable problem was resolved by installation of a unistrut/trolley system to support the cables by November 1998. (R4, tabs 9, 13, 27, 38, 41, 42)

The third discrepancy listed in the inspection letter involved the C-arm ISO center as not being within VA specifications. The VA "specifications" were contained in the Manual. The Manual is a 58-page document consisting of two major parts: "Delivery Order Verification" and "Technical Inspection." The Delivery Order Verification section, consisting of seven pages, provides general instruction on verifying that the item delivered contains all the features listed in the product information and that the machine is functioning and undamaged. In addition, the section directs that the installation of the instrument and the set-up of the room containing the instrument be checked. The "Technical Inspection" section contains detailed technical parameters for an instrument's radiographic, electrical and mechanical performance and detailed procedures to test for those parameters. Discussing the character and purpose of the Manual, Mr. William V. Zacko, a SAMS Quality Assurance Specialist, by affidavit stated:

> Clinical significance is not controlling with respect to VA quality assurance standards. VA-SAMS Quality Assurance Manual and inspection procedures are prescribed to protect government purchases with regard to the following:
>
> - Current Good Manufacturing Practice (CGMF)
> - Proper Installation and Operation
> - Delivery of Goods
> - Radiation Safety
> - Inventory Control.

(R4, tab 35)

The Manual permitted a +/- 1 centimeter (cm) centering tolerance on the radiation beam when moving the table or arm. In the initial inspection the center of the dose was 2.5 to 4 cm out of tolerance. Although it initially claimed this movement had no clinical effect on the performance of the EP32 system, FIC made modifications to resolve the beam-centering problem.
(R4, tabs 5, 13, 14, 32, 49)

The fifth discrepancy noted was the non-functioning table control ISO center button. The ISO center button was intentionally non-functional in the EP32 configuration but remained on the control panel because the same panel was used for other FIC electrophysiology system models. The non-functioning button was explained in the EP32 manuals. Mr. Kirwan, without referencing the EP32 manuals, listed the non-functioning button as a deficiency because it was a button on the control panel and it did not work. FIC resolved the problem with a replacement control panel that did not contain the button.
(R4, tabs 5, 14, 39, 41, 43, 44)

Discrepancies 6-12 listed on the February 16, 2000 inspection letter were missing manuals or drawings. Mr. Kirwan listed manuals as a discrepancy if he could not locate two of each manual or drawing as the DO required or if the copies in the VA's possession showed different revision dates. FIC maintains that all manuals had been delivered to VAMC LA by October 1998. However, FIC again either copied the manuals and drawings locally or ordered new ones and noted Discrepancies 6-12 of the February inspection as resolved in its letter of March 3, 2000. (R4, tabs 13, 14, 43, 44)

Discrepancy 13 was the failure of the EP32 to meet the 1.5 second minimum to maximum and 1.8 second maximum to minimum fluoroscopic response time standard of the Manual. The EP32 response times were 5 seconds

and 4.92 seconds both ways respectively for the first and second SAMS inspections. The response time failure was characterized as the primary reason for the SAMS recommended rejection of the system. After the first inspection, although not providing the information to the VA, FIC, in internal communications, acknowledged that the EP32 could not meet the Manual response time standard. However, in response to the Cure Notice, FIC devised software and hardware fixes that brought the response time within the standard. FIC personnel installed and tested the new software and hardware and confirmed that they would bring the kvp response time into conformance with the Manual requirements; however, these "fixes" were removed prior to the February 2000 SAMS inspection pending the "validation" of the software for use on the EP32. (R4, tabs 13, 14, 34, 39)

The response time standard in the Manual is contained in the "Fluoroscopic Automatic Brightness Control Response" section. The VA asserts that the response time testing protocols are adapted from American Association of Physicists in Medicine (AAPM) standards and that the VA considers the response time as an indicator of image quality. Mr. Kirwan acknowledged that he "passed" the EP32's image notwithstanding the response time performance. Moreover, FIC, on February 9, 2000, recalibrated the EP32 and took other steps to improve the image. These efforts made the image acceptable to VAMC LA electrophysiology lab personnel. (R4, tabs 31, 38, 39)

The EP32 was in continuous use at VAMC LA from August 5, 1998 through the termination of the DO in March 2000 during which time approximately 170 procedures were performed. (R4, tab 24)

FIC made warranty and maintenance service calls at VAMC LA at no charge to the VA during the entire period up to the termination for cause.

VAMC LA personnel complained about the reliability of the EP32, citing four instances between October 1998 and December 1999 when the system was down for one day or more and nine services calls to repair the EP32 in the period between November 1998 and December 1999. Although the VAMC LA personnel make general statements about "continued breakdowns" and "inadequate performance" the record contains no evidence of the EP32 failing the on-line standard set in the Contract OPERATIONAL UPTIME clause. (R4, tabs 12, 31)

Fischer removed the EP32 from VAMC LA as directed by the CO in May 2000. On September 6, 2000, FIC submitted a claim to the CO for $9,600 for the costs of the EP32 removal; on September 19, 2000, the CO issued a final decision denying the claim. The record does not disclose the date of the CO's receipt of FIC's claim; accordingly, in light of the fact that September 6, 2000 was a Wednesday, we will consider the following Monday, September 11, 2000, as the date of the CO's receipt of the claim. The record discloses that two FIC engineers dismantled and removed the EP32 between May 15 and May 18, 2000, expending a total of 64 hours, according to the FIC "Incident Report Register" in travel to VAMC LA and removal labor. Based on an apparent internal e-mail, FIC claims 60 hours of labor for the EP32 removal at $160 per hour. The CO, in his final decision denying the claim, questioned neither the number of hours claimed nor the labor rate. He based his decision solely on the determination that the VA had no liability for the costs of removing the EP32 because the DO had been terminated for cause. (R4, tabs 20, 29, 34)

DISCUSSION

We have had recent occasion to address an appeal from a termination for cause under another delivery order placed under the Contract in ***Fischer Imaging Corporation***, VABCA-6125-6127, 2002 WL 31057467 (September 10, 2002), which we will designate as ***Fischer I***. ***Fischer I*** involved the VA's termination for cause of another delivery order under the Contract for an FIC electrophysiology system similar to the EP32. The positions of the parties in this case essentially mirror those taken in ***Fischer I*** and, since the identical Contract provisions apply, the same result will obtain.

In ***Fischer I***, the VA did not inspect until 53 days after it received the request for inspection. In this case, it is unclear when the VA received the request for inspection. However, the CO, on July 28, 1998, requested that SAMS complete its inspection by August 26, 2000. Based on this, we will presume the VA's receipt of the FIC July 22, 1998 request for inspection on July 27, 1998. Consequently, the inspection was begun 49 days and not completed until 53 days after the VA's receipt of the request for inspection. The Contract acceptance terms are delineated in FAR 52.212-4(a), INSPECTION AND ACCEPTANCE and the addenda to FAR 52.212-4 found at Section II-3, ACCEPTANCE PROCEDURES of the Contract. As we explained in ***Fischer I***, these Contract terms result in a "deemed" acceptance of the EP32 if the VA does not inspect within 30 days of its receipt of a request for inspection.

Notwithstanding its failure to complete its inspection of the EP32 until 53 days after it received FIC's request for inspection, the VA asserts its "deemed acceptance" is essentially without Contractual significance and it is permitted to act as if it never accepted the EP32. As we explained in ***Fischer I***, adoption of the VA's position would require us to read the "deemed acceptance" provisions of the ACCEPTANCE PROCEDURES out of the Contract, contrary to the accepted rules

of contract interpretation, which require that we try to reconcile the clear language of the Contract in order to impart meaning to all its terms. Moreover, it would seem the position the VA takes in its BRIEF asserting that the deemed acceptance provisions of the Contract do not impact the VA's absolute right to unilaterally determine when it accepted the EP32, is contrary to the CO's understanding of the Contract terms. The CO, when requesting the initial SAMS inspection, asked that it be completed within the 30-day window provided in the Contract indicating that he understood the Contract terms regarding acceptance. ***Hercules, Inc. v. United States***, 292 F.3rd 1378 (Fed. Cir. 2002); ***Brant Construction Management, Inc.***, VABCA No. 5391, 98-2 BCA ¶ 30,073.

As addenda to FAR 52.212-4(a), the Contract ACCEPTANCE PROCEDURES must be read in conjunction with the FAR clause and reconciled with those provisions. The FAR and VA acceptance terms can be reconciled by reading Paragraph (d) of the ACCEPTANCE PROCEDURES as an implementation of the FAR 52.212-4(a) instructions concerning post-acceptance rights. This interpretation recognizes the clear meaning of Paragraph (a) of the ACCEPTANCE PROCEDURES providing for "deemed acceptance" and delimits, in Paragraph (d), the VA's rights to inspect after acceptance; the beginning of any warranty period; the right to require correction of deficiencies; or, revoke acceptance as part of its post-acceptance rights. We note also that this interpretation is consistent with the Contract payment provisions, which provide for an 80% interim payment of the Contract price after delivery and payment of the remaining 20% after acceptance. The TECHNICAL ACCEPTANCE provision, set forth as a continuation of the SF 1449 Contract document, provides for payment of the 20% remainder after a "deemed acceptance". There is a further inconsistency in the Contract terms in that the TECHNICAL ACCEPTANCE provision sets the deemed acceptance window

at 45 days from the date of the request for inspection by the contractor for the purposes of establishing when the 20% remainder payment is due. This 45-day period, however, is limited by the express language of the TECHNICAL ACCEPTANCE provisions to determining the due date for payment of the 20% remainder of the Contract price. Thus, the VA's failure to inspect within 30 days of the request for inspection is an "acceptance" of the EPX under the terms of the Contract.

Since the VA accepted the EP32, the termination of the DO for cause is an attempt by the VA to revoke that acceptance. In other words, we look to the parameters of the VA's post-acceptance rights to determine if the termination was proper. The Contract, in the clause at 52.212-4(a), in the factual situation here, provides for the VA to exercise its post-acceptance rights "within a reasonable time" after discovery of a deficiency in the EP32. Thus, we must ascertain, in the absence of a Contract definition of "reasonable", whether the VA's properly revoked its acceptance by the termination for cause in March 2000, 597 days after the VA accepted the EP32 and 540 days after the CO was first informed of the EP32 deficiencies forming the basis for the termination.

As we did in ***Fischer I***, we look to the Uniform Commercial Code (UCC) to provide us guidance on the effectiveness of the VA's revocation of acceptance. ***Franklin Pavkov Construction, Co. Inc.*** 279 F.3rd 989 (Fed. Cir. 2002); ***John C. Kohler Co. v. United States***, ***489*** F.2d 1360, (Ct. Cl. 1974): ***Trio-Tech, Incorporated***, VABCA No. 598, 68-1 BCA ¶ 6828; ***Mazur Bros. & Jaffe Fish Co., Inc.***, VABCA No. 512, 65-2 BCA ¶ 4932; ***ABM/Ansley Business Materials***, GSBCA No. 9367, 93-1 BCA ¶ 25,246.

The CO's knowledge of the EP32's deficiencies ostensibly making it unacceptable on September 22, 1998 and the VA's continuous productive use of the EP32 for medical procedures for well over one year prior to the attempted revocation speak for themselves. UCC § 2-608 states, in relevant part:

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it
>
> > (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured….
>
> * * * * * *
>
> (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

As we explained in ***Fischer I***, the VA could validly revoke its acceptance of the EP32 if the deficiencies "substantially" impaired the value of the EP32 to the VA and its acceptance of the EP32 was based on a reasonable expectation that FIC would cure the deficiencies. It is clear that the termination for cause in this case rests primarily on the non-conformity of the EP32 flouroscopic response time with the standards in the Manual. FIC's responses to the September 1998 inspection provided no representation that the response time non-conformity would be cured until February 2000. The VA used the EP32 continually for approximately 18 months after it was aware of the response time deficiency; this fact indicates that the response time problem did not substantially impair the

value of the EP32 to the VA. Also, the VA, until February 2000, had no reasonable expectation that the response time deficiency would be rectified. These facts belie the existence of any valid basis, under UCC 2-608, for the VA's revocation of its acceptance. Thus, we find the VA's attempted revocation of its acceptance of the EP32 to be invalid. Consequently, the VA is not entitled to repayment of the purchase price of the EP32 and it has no basis to assess FIC the excess cost of acquiring a replacement electrophysiology system. ***Ted Sobiech, d/b/a/ Ted Sobiech Farms v. International Staple and Machine Co., Inc.***, ***867*** F.2d 778 (2nd Cir. 1989); ***Computerized Radiological Services v. Syntex Corporation,*** 786 F.2d 72 (2nd Circuit 1986); ***ABM/Ansley Business Materials***, GSBCA No. 9367, 93-1 BCA ¶ 25,246; ***Electro Optics, Inc.***, ASBCA No. 22,017, 78-1 BCA ¶12,996.

Although the VA's acceptance of the EP32 and the invalidity of its attempted revocation of the acceptance is dispositive here, there are several other issues that reinforce the determination that termination of the DO for cause was improper.

First, the VA, by its continuous, successful use of the EP32 for 18 months prior to the termination for cause, constructively accepted the EP32. UCC § 2-606 (1) states:

> (1) Acceptance of goods occurs when the buyer does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

The VA, for a year between December 1998 and December 1999, knew what it had. However, other than desultory attempts by form letter asking FIC to explain its efforts to rectify the deficiencies identified in the September 1998 inspection, the VA was satisfied to continue using the system. FIC's lack of

response to the CO's letters in this time period is curious but reasonably explained by FIC's belief that the EP32 had been accepted and that it was maintaining the system as part of its warranty obligation. This conclusion is supported by FIC's expressed expectation that it would be paid the remaining 20% of the purchase price. The VA clearly exhibited ownership and control over the EP32 by its extensive use of the system. Thus, the VA constructively accepted the EPX. ***Ted Sobiech, 867*** F.2d 778; ***Computerized Radiological Services,*** 786 F.2d 72; ***John C. Kohler Co., 489*** F.2d 1360 (Ct. Cl. 1974); ***Mazur Bros. & Jaffe Fish Co***, 65-2 BCA ¶ 4932; ***Ateron Corporation***, ASBCA No. 46,867, 96-1 BCA ¶ 28,165

Second, resting the termination on the deviation of the EP32 from Manual standards raises the question of whether the VA can properly demand FIC's adherence to those standards. As we fully explained in ***Fischer I***, we question both the propriety of the VA's inclusion of the Manual as a detailed design/performance specification in its "commercial item" acquisition embodied in the Contract and the manner in which it is included in the Contract. Since we deal with the same Contract here, those questions obviously remain and our conclusions in ***Fischer I*** regarding the VA's compliance with FAR Part 12 commercial item procurement requirements and policy apply to this case as well.

Third, the VA strongly asserts that it is entitled, under traditional government contract principles, to receive exactly what it specified. The only significant, putative Manual deviation supportable by the facts here is the kvp response time. Although the facts indicate that the EP32 was capable of being modified to meet the kvp response time standard, it did not meet the standard at either SAMS inspection. However, the CO made no attempt to verify the viability of the modification asserted by FIC; the VA takes pains to point out that

satisfactory clinical performance of the EP32 does not affect its right to demand Manual kvp response time compliance. Here, where the VA's inspector passed the EP32 image and where the VA points out that kvp response time is a test of image quality, the VA's unreasoning adherence to the technical letter of the Manual standard to justify the termination seems even more untenable in the context of this commercial item acquisition.

Finally, the reasonableness of the CO's termination decision is called into question by the facts presented here. In December 1999, the CO solicited VAMC LA for evidence of the EP32's deficiencies necessary to effectuate removal of the system, a purpose he related to VAMC LA personnel who had already expressed "buyer's remorse" about its selection of the EP32 and complained to the CO. The response to this solicitation for damaging evidence is surprising only in the fact that VAMC LA could provide only generalized complaints and evidence that, in the course of over a year, a small number of service calls were required to support the EP32. Mr. Bense issued the Cure Notice one day after sending FIC the results of the second SAMS inspection inviting FIC to resolve the deficiencies identified in the inspection and to schedule a re-inspection. By his own memoranda and actions, Mr. Bense documents his apparent cavalier disregard of FIC's representations that it had resolved all discrepancies. In the first place, his only attempt to verify FIC's representations was by way of a cursory inquiry to someone at VAMC LA with little or no knowledge of the system. Secondly, he essentially ignores FIC's claim that all discrepancies had been resolved because he received their letter two days after the March 1 date set forth in the Cure Notice. This suggests that the decision to terminate was made in January 2002 and that Mr Bense had no intent to consider any response FIC may make to the inspection or Cure Notice. In the same way that we found the CO's failure to

adequately investigate how long it would take a contractor to complete work before terminating that contract for default to be arbitrary in ***Jamco Constructors, Inc.***, VABCA Nos. 3271, 3516T, 94-1 BCA ¶ 26,405, Mr. Bense's failure to fairly and adequately consider whether FIC had cured the deficiencies on which the termination is based appears to be arbitrary which would make the termination for cause improper.

Since the VA's acceptance of the EP32 was not properly revoked, the termination of the DO for cause cannot stand. By operation of the Contract clause at FAR 52.212-4 (m), the termination of the DO for cause is converted to a termination for the Government's convenience within the terms of the clause at FAR 52.212-4 (l).

The record supports the 60 hours of labor FIC claims it took to remove the EP32. The VA objects that FIC has not proven the basis for the $160 per hour labor; however, FIC has furnished *prima facie* evidence of the rate. The VA had ample opportunity to litigate the issue but provides nothing, other than its generalized objections, to rebut the labor rate. Since we have here converted the termination for cause to a termination for the Government's convenience pursuant to the Contract terms, the costs of removal of the EP32 would properly be payable as part of a termination for convenience settlement. However, we have recognized that recovering on an appeal of a final decision denying a claim otherwise cognizable under a termination for convenience settlement is not precluded where there is also a contested default termination that is converted to a termination for convenience. ***Delfour, Inc.***, VABCA Nos. 3803, 3832, 3897-3901, 94-1 BCA ¶ 26,385.

Thus, FIC is entitled to recover the costs of removing the EP32 from VAMC LA in the amount of $9,600.

DECISION

For the forgoing reasons, the Appeals of Fischer Imaging Corporation, VABCA-6343, 6344 and 6446, 6460 under Contract No. V797P-6712A, Delivery Order 797160814, are **SUSTAINED.** The termination of Delivery Order V797160814 for cause is converted to a termination for the Government's convenience. The claims by the VA for repayment of $324,174, the amount of the purchase price paid (VABCA-6344) and for excess reprocurement costs of $17,221 (VABCA 6446) are hereby **DISMISSED**. Fischer Imaging Corporation is entitled to a judgment in the amount of $9,600 in the appeal in VABCA-6460 plus interest pursuant to the CONTRACT DISPUTES ACT from September 11, 2000, the date of the Contracting Officer's receipt of the claim.

DATE: **October 22, 2002**

_____
RICHARD W. KREMPASKY
Administrative Judge
Panel Chairman

We Concur:

_____
GUY H. MCMICHAEL III
Chief Administrative Judge

_____
JAMES K. ROBINSON
Vice Chairman